NO. 22509

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

- - -

ANK J. EVANS and RGUERITTE A. EVANS, Appellants, v. MMISSIONER OF INTERNAL REVENUE, Appellee.	)

APPELLANT'S REPLY BRIEF

---

peal from the Decision of the Tax Court of the United States, norable Norman O. Tietjens, Judge. (Decision Reviewed by the urt).

NOLAND, HAMERLY, ETIENNE & FULTON
333 Salinas Street, P.O. Box 849
Salinas, California 93901

Counsel for Appellants

INDEX

CITATIONS

Cases

Statutes

Miscellaneous

ARGUMENT

lity Connections

The appellee in the heading and several places in the body of argument refers to "utility connections". Although it is a paratively minor point, it should be made clear that the stipu-ed facts in the case contain no reference to "utility connections" that term is not defined in appellee's brief or elsewhere. The pulation of facts (R.17, 18, 19) clearly states in several ces (e.g., Stip. No. 3, R.16, 17) that the appellant purchased operated four utility systems which, it is stipulated, had a bined total cost of not less than $50,000. Apparently appellee using the term "utility connections" hopes to create the impres-n that the utility systems in issue are comparatively minor in ure. However, the utility systems are extensive, covering 111 ile home spaces, and complete, including for example gas and ctric meters for each mobile home.

mittee Report Citation

The appellee in his brief on page 8 states as follows:

"The purpose of the investment credit provision was to encourage investment by respective industries in furtherance of their capital expansion and "to encourage modernization and expansion of the Nation's productive facilities and to improve its economi potential***". See H. Conference Report No. 2508 87th Cong. 2nd Session Page 14 (1962-3 C.B. 1129, 1142); Madison Newspapers Inc. v. Commissioner 47 TC 630, 635. It is clear that the taxpayer's utility connections did not fall within the broad purpose of the investment credit provisions".

The citation to the conference committee report is to the tatement of the managers on the part of the House, and it reads in l as follows:

> "It is the understanding of the conferees on the part of both the House and the Senate that the purpose of the credit for investment in certain depreciable property, in the case of both regulated and non-regulated industries, is to encourage modernization and expansion of the Nation's productive facilities and to improve its economic potential by reducing the net cost of acquiring new equipment, thereby increasing the earnings of the new facilities over their productive lives." (Underscoring supplied).

After the statement with respect to the conference report and e Madison Newspapers case is placed in its full context, it is ear that the four systems in issue here come within the investment edit provisions, especially if the underlined portion of the full xt of the committee report above is emphasized. It must, of course, borne in mind that used as well as new equipment and facilities alify for the investment credit.

The reference to the conference committee report and to dison Newspapers, Inc. v. Commissioner, Supra, were taken almost rbatim from the concurring opinion (R.79), and it is noteworthy at after the material quoted above the concurring opinion continues follows:

> "Perhaps, if petitioners had operated their own power station, or purchased and stored bottled gas in quantity, and maintained systems of distributing electricity of gas therefrom to their trailer park tenants, they would be entitled to the benefit of the investment credit -- whether or not they operated such systems separately or at a profit.***"

This portion of the concurring opinion is commented upon in pellant's brief, third paragraph on page 22. As pointed out there,

Judge Tannewald had been aware of the minute difference between
chasing bottled gas and distributing it to mobile home owners
the one hand, and purchasing electrical energy, gas and water,
distributing those to the mobile home owners on the other hand,
difference being only that in one instance there was an
entory, whereas in the other instance, there was no inventory,
is quite likely that he (Judge Tannewald) would have changed
opinion on the entire matter.

In any event, the quotation from the committee report and the
ation of Madison Newspapers, Inc., is of little value in attempt-
to arrive at a solution to the problem before the court.

sumer

In the first paragraph at the top of page 9 of appellee's
ef, appellant is characterized as being the "consumer" of the
r services which were supplied to the mobile home owners in
l Cliffs Mobile Homes Park. This characterization of the
ellant as the consumer of the electrical energy, gas, water and
age disposal services again arises from the concurring opinion
Judge Tannewald, and is contrary to the stipulated facts in the
e because if appellant was the consumer, then there would be two
sumers of the same services. That is, appellant would be the
sumer and the owners of the mobile homes in Opal Cliffs Mobile
es Park would also be the consumers. This, it is submitted, is
ently impossible. Perhaps it would be well to refer to the
tionary for a definition of the word "consumer". The following
inition is from Webster's New International Dictionary of the
lish Language (1931) pg. 483:

"Consumer - 1. One that consumes. 2. Economics - one who uses (economic) goods, and so diminishes or destroys their utilities; - opposed to producer".

Going one step further, the word "consume" is defined in the e dictionary as follows at page 483:

"Consume - 1. To destroy, as by decomposition, dissipation, waste or fire. 2. To use up, expend, waste; devour. Consume - v.i. to waste away or suffer destructions".

It is clear from the stipulated facts that the appellant did use up, expend,waste, or devour the electrical energy, gas, er and sewage disposal services which were used by the mobile e owners in Opal Cliffs Mobile Homes Park; therefore, by inition, appellant was not the "consumer" of the electrical rgy, gas, water, and sewage disposal services in this case.

field example

On page 9 of appellee's brief, the following quote appears:

"An example is then given of a manufacturing firm which constructs an airstrip for use by airplanes operated for the convenience of its officers and employees, with the statement that such airstrip would not qualify as "Section 38" property since the manufacturing firm is not engaged in the transportation business***".

This example is readily distinguished from the present fact uation. In the example, the airstrip was simply a matter of venience for the officers and employees of the manufacturing rporation, and therefore was not essential to the functioning of manufacturing business; however, in the instant case, the four stems in issue are essential to the operation of Opal Cliffs bile Homes Park which is a separate entity, economically and ographically, and the appellant is engaged in a trade of siness of furnishing electrical energy, gas, water, and sewage sposal services for the separate economic and geographic entity

is indicated by the stipulation of facts (R.17, 18, and 19).

blic Utility Property

In the paragraph at the bottom of page 9 of appellee's brief ich continues over to page 10, appellee goes into the rules for termining what property is public utility property for a siness which is engaged both in a public utility activity and activity which is not a public utility activity. It is noterthy that appellee has skipped a link in his analysis, in that fails to show or even allege that the property in issue in the stant case is public utility property. Since appellee has ver contended that appellant was engaged in a public activity, he premature in applying section 46(c)(3) and section 1.46-3(g) Treasury Regulations on Income Tax (1954 Code).

The appellee apparently is contending that the property in sue can only qualify for the investment credit if it is first termined that the property is public utility property. There is requirement in the code, regulations or elsewhere that "other ngible property" under section 48(a)(1)(B) of the Internal venue Code of 1954 must qualify as public utility property before will qualify as "Section 38 property".

It is submitted that the correct sequence of analysis is first determine whether the property in question qualifies under ction 48(a)(1)(B) of the Internal Revenue Code of 1954, and if is determined that the property qualifies under section 48(a)(1)(e property is then classified as Section 38 property. The next ep is to determine whether the property is public utility operty by applying section 46(c)(3). The sole function of section

(c)(3) is to limit the investment credit on public utility
operty to 3/7th of the amount otherwise allowable. As noted
ove, the issue of whether the property in question is public
lity property has never been raised by appellee; therefore,
ellee in discussing section 46(c)(3) on pages 9 and 10 of his
ef is applying an erroneous standard.

rnishing lodging

In the last full paragraph on page 10 of his brief, appellee
es up the question of the applicability of section 1.48-1(h)(1)
) of Treasury Regulations on Income Tax (1954 Code). This
tion of the regulations applies only where a taxpayer is engaged
the trade or business of furnishing lodging. The appellee has
de no allegation that appellant is in the trade or business of
rnishing lodging, also, the Tax Court on stipulation of counsel
appellee, allowed the appellant an investment credit for the
st of washing machines and dryers purchased by appellant in 1962
19,66).

If the appellee believed that the appellant was engaged in
operation of a lodging facility, he would not have stipulated
at the appellant was entitled to the investment credit on the
shing machines and dryers because of the limitation on section
property in section 48 (a)(3) which is amplified in Regulation
ction 1.48-1(a)(h)(ii) as follows:

"The property which is used predominantly in the operation of a lodging facility or in serving tenants shall be considered used in connection with the furnishing of lodging, whether furnished by the owner of the lodging facility or another person. Thus, for example, lobby furniture, office equipment and laundry and swimming pool facilities used in the operation of an apartment house or in serving tenants would be considered used predominantly in connection with the furnishing of lodging."

It is thus apparent from the previous actions of the appellee this case that he considers the appellant to be in a business her than that of furnishing lodging. This of course means that e reasoning of the appellee in the last full paragraph on page 10 his brief is erroneous and inconsistent with the previous actions ken in the case.

Also, the Internal Revenue Service in Revenue Ruling 66-269, 66-2 Cum.Bull. 13 sets forth its (Internal Revenue Service's) sition with respect to trailer parks and the investment credit d therein does not mention the subject of the lodging business mitation while approving an investment credit for electric pumps ed by the owner of a trailer park.

cupation

In the first paragraph on the top of page 11 of his brief, the pellee indicates that the appellant stated his occupation to be railer park owner" or "trailer park operator". This is true, wever, by looking at the exhibits reproduced in the record (R.20 , 51) it will be noted that the space is rather small and has sufficient room for entering more than one occupation. Therefore, ere is little probative value to this particular entry in the pellant's income tax returns.

rnishing

In the second full paragraph on page 11 of his brief, pellee again quotes the concurring opinion of Judge Tannewald the effect that the appellant was not "furnishing" the utilities the owners of mobile homes in Opal Cliffs Mobile Homes Park. so, in this section of his brief, appellee again argues that the pellant is the "consumer" of the services in question.

The question of the proper use and definition of the word onsumer" as applied in this case was taken up in an earlier part this reply brief, therefore it is unnecessary to go over that int again. The word "furnishing" is an important word in the atute and it should be examined in order to determine what s intended by Congress when it used the word. In Webster's New ternational Dictionary of the English Language (1931), the llowing definition of "furnishing" is given at page 879:

"Furnishing - 1. Act of supplying furniture or fittings. 2. Ornament; adornment. 3. pl. Furniture, fixtures, apparatus, etc."

That definition is of little help however, the word furnish is fined in the same dictionary as follows at page 879:

"Furnish - 1. To accomplish; insure. obs. 2. To provide for, to provide what is necessary for; to fulfill or satisfy the needs of; to equip; to fit out or fit up; as to furnish an expedition; to furnish a table; to furnish a man for a journey; of things, to serve as furnishing or provisions for; - often with forth or out. 3. Specif. To supply with furniture and fittings, as to furnish a house. 4. To provide; supply; give; afford; specif.: a. To supply (a person, thing with something); as to furnish the garrison with troops; - formerly also with of. b. To supply or offer(something); to give; present; yield; as to furnish food to the hungry; to furnish sound reasons."

In applying the definition above to the instant case, it ould be borne in mind that the stipulated facts show appellant rchased electrical energy, gas and water, distributed the elec- ical energy, gas and water through his distribution system to the ners of mobile homes in Opal Cliffs Mobile Homes Park, charged, lled and collected for the electrical energy, gas and water at a ice in excess of the purchase price, and maintained the entire stem within the geographic boundary of Opal Cliffs Mobile Homes rk. Also, it is noteworthy that the following language appears Exhibit 4-D to the stipulation of facts (R.49).

"(C.) Resale of electricity
A customer shall not furnish or resell electricity received from the utility to any person except:***." (Underscoring supplied).

Almost the exact language appears in Exhibit 5-E (R.50) govern- g the resale of gas.

The foregoing definition and facts indicate that appellant urnished" electrical energy and gas by resale to the mobile home ners in Opal Cliffs Mobile HOmes Park. Similar conclusions would appropriate for the water and sewer systems. It is quite possible at Judge Tannewald overlooked the contents of Exhibits 4-D and 5-E concluding that appellant was not "furnishing" electrical energy, s, water, and sewage disposal services to the owners of mobile mes in Opal Cliffs Mobile Homes Park.

Appellee apparently would confine the use of the word "furnish" "furnishing" to a manufacturer engaged in retailing his product. e definitions are devoid of any language which would support this terpretation. Likewise, the actual use of the word furnish in hibits 4-D and 5-E (R.49,50) is contrary to such a limited meaning.

venue Ruling 66-269

On page 12 of his brief, appellee refers to Revenue Ruling -269, 1966-2 CUM Bull. 13, which first appeared in Internal venue Bulletin 1966-39, September 26, 1966. The petition in the stant case was filed in the Tax Court on June 3, 1966 (Tax Court cket page 1) some three and one-half months prior to the time at Revenue Ruling 66-269 was published. It is not the intent of e comparison of dates to suggest that Revenue Ruling 66-269 was sued because the instant case was at issue in the Tax Court; wever, it would seem strange if one of the litigants in a contested tter could prevail by publishing a document setting forth his inion of the law after the case was before a court, and then te that opinion as authority to the court in the litigated case. e point that should be kept clearly in mind is that the Revenue ling represents an interpretation by the Internal Revenue Service out the application of Section 48(a)(1)(B) and that the Internal venue Service is a party to this action. Therefore, it would not pear to be proper for the Court to decide the case in reliance upon venue Ruling 66-269.

Aside from the self-serving nature of Revenue Ruling 66-269, is distinguishable from the facts in the instant case. The venue Ruling does not cover a situation where the trailer park owne s purchasing the electrical energy, gas and water at one price and selling them to the owners of trailer homes at an increased price. nce the aforementioned facts are not present in Revenue Ruling -269, its value as a precedent is severely limited. Another point

bout the Ruling is that it seems to be in conflict with the ncurring opinion of Judge Tannewald in this case, in that pparently Judge Tannewald would permit the investment credit for e water well and the water system because the entire water stem in the trailer park would have been operated by the owner the park, that is, the owner of the park would be "furnishing" ter to the trailer home owners. This result, according to dge Tannewald, would not be altered by the fact that the water stem might not have been operated separately or at a profit.

It is interesting to note that Revenue Ruling 66-269 alyzes the question of whether the trailer park owner was titled to the investment credit by using the rules in Section of the Internal Revenue Code of 1954 and not by using the les in Section 46(c)(3) of the Internal Revenue Code of 1954 appellee is attempting to do on pages 9 and 10 of his brief.

SUMMARY

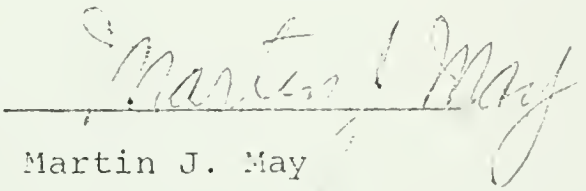
Appellee is attempting to apply an incorrect standard in ting section 46(c)(3) as the governing section for the termination of whether the utility systems in issue qualify "section 38 property". The correct standard as set forth in pellant's opening brief is section 48 (a)(1)(B). The pellant was engaged in furnishing electrical energy, gas, ter and sewage disposal services to the consumers of those rvices (the mobile home owners in Opal Cliffs Mobile Home rk); therefore, the property used in furnishing those services "section 38 property" under the standards of section 48(a))(B).

CONCLUSION

The decision of the Tax Court should be reversed.

Respectfully submitted,

NOLAND, HAMERLY, ETIENNE & FULTON

By 

Martin J. May

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Martin J. May